Supreme Court, U.S.
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No. 99-211

IN THE

Supreme Court of the United States

DOROTHY NASH-HOLMES, et. al.,

Petitioners,

–against–

HERB HALLMAN CHEVROLET, et. al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO CONDITIONAL
CROSS-PETITION FOR A WRIT OF CERTIORARI

NATHAN Z. DERSHOWITZ
DERSHOWITZ & EIGER, P.C.
350 Fifth Avenue, Suite 7912
New York, NY 10118
(212) 967-0667

COUNSEL OF RECORD

AMY ADELSON
Of Counsel

Attorneys for Respondents

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STATEMENT OF THE CASE

As set forth more fully in the related Petition for a Writ of Certiorari filed on July 2, 1999 by John P. Stanko, Herb Hallman Chevrolet, Inc. (the "dealership"), and several of the dealership's employees, the defendants in this civil rights case -- cross-petitioners here -- were granted partial summary judgment on the ground that they were immune from suit on most of the civil rights claims.

The claims that were not dismissed arose out of press releases and other statements the defendants made to the media throughout the three year investigation of the plaintiffs. Specifically, plaintiffs alleged that the defendants published false and defamatory statements to the media after the indictments were returned and the plaintiffs were arrested, and following the District Attorney's voluntary dismissal of the indictment.

The amended complaint alleged in some detail specific defamatory remarks defendants made about the plaintiffs. For example, the amended complaint alleged that, shortly after the indictments were returned and the arrest warrants were issued, in an article dated July 4, 1993 in Daily Spark's Tribune, defendant Dorothy Nash-Holmes, the District Attorney of Washoe County, stated "We think there was a lot of scamming involved," and "We thought the whole operation was fraudulent in terms of the files we looked at." (RE 23) The amended complaint also alleged that, in July 1993, in the Reno Gazette-Journal, defendant Donald Coppa, the chief Deputy District Attorney, made similar comments about the dealership's purportedly dishonest dealings with public. (Id.)

The amended complaint also detailed defamatory statements made by defendant Holmes shortly after the District Attorney's office voluntarily dismissed all of the charges against the dealership, Stanko, and all but two of the employees. Holmes

told the press that "the court is requiring us to dismiss the charges against Stanko and the dealership because of how they ar plead, not a lack of evidence" (RE 31), a statement the Nevada state court later characterized as a misrepresentation of what took place. (RE 335-36) And, even though a Deputy District Attorney had stipulated that there was not even "slight or marginal evidence" to support the charges, Holmes again accused the plaintiffs of engaging in fraud, stating that "dozens of victims were cheated for paying for warranties they didn't want, the rebates were kept from them, and lease contracts were hiked up" (RE 31), a statement which the Nevada court, in its scathing opinion, criticized as ethically improper.

The amended complaint alleged that these statements, as well as other similar statements made to the dealership's customers, damaged plaintiffs' reputation and good will. (RE 31, 33) Plaintiffs also alleged that defendant Coppa threatened plaintiffs that if they "went public" with their criticism of the investigation, there would be "adverse publicity," and that this had a "chilling effect" on plaintiffs' exercise of their First Amendment rights (RE 33), and that the defamatory statements were made pursuant to the unconstitutional searches and arrests and to deter plaintiffs from pursuing a civil rights claim against the defendants. (RE 34, 30, 31)

Plaintiffs had made a substantial record supporting a due process claim for "defamation plus." Nevertheless, after defendants moved for summary judgment on the remaining claims (a motion plaintiffs opposed), the plaintiffs voluntarily agreed to dismiss their remaining claims. Plaintiffs made it clear that their purpose in seeking the dismissal of the defamation plus claims, as well as the other remaining claims, was to expedite the appeal on the dismissed constitutional claims -- an appeal that could not be pursued until a final judgment was entered. (RE 409)

Defendant moved for attorneys' fees pursuant to 42 U.S.C. § 1988. The District Court, without addressing the merits of the defamation claim, and without mention of the fact that the amended complaint had already survived a motion to dismiss, found plaintiffs due process-defamation plus claim to be frivolous and awarded defendants attorneys' fees.

The Ninth Circuit reversed.[1] Noting that, under existing Ninth Circuit law, a plaintiff can state a cognizable claim pursuant to 42 U.S.C. § 1983 for "defamation-plus," the Ninth Circuit held that the plaintiffs had asserted a defamation plus claim and that their claim was not so frivolous or so lacking in merit as to justify an award of attorneys' fees to the defendants. (App. 17-20)

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

I. THERE IS NO IMPORTANT, NOVEL OR COMPLEX QUESTION RAISED BY THE NINTH CIRCUIT'S DECISION THAT DEFENDANTS WERE NOT ENTITLED TO ATTORNEYS' FEES IN CONNECTION WITH PLAINTIFFS' DEFAMATION PLUS CLAIMS

In seeking a conditional writ of certiorari, the defendants do not assert that the Ninth Circuit applied the wrong standard in rejecting their claim for attorneys' fees, nor do they claim that the law concerning when prevailing defendants are entitled to attorneys' fees is confusing or should be changed.[2]

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[1] The Ninth Circuit opinion is set forth in Petitioners' July 2, 1999 Petition for a Writ of Certiorari at App. 1.

[2] Defendants apparently concede that attorneys fees are to be granted to a prevailing defendant in a civil rights case only

Instead, the defendants criticize the Ninth Circuit for not addressing each of the separate grounds asserted by the defendants as a basis for attorneys' fees, and for purportedly misunderstanding the law of Nevada concerning whether good will constitutes a property right. They then ask this Court to review the decision to "clarify" the level of deference that should be granted to trial court decisions granting attorneys' fees to prevailing defendants.

There is no need for this Court's intervention. The Ninth Circuit has long held that it reviews legal questions concerning an award of attorneys' fees de novo, and if the district court applied the correct legal standard, reviews for abuse of discretion questions concerning the propriety and amount of the fees. See, e.g., Hall v. Bolger, 768 F.2d 1148, 1150 (9th Cir. 1985). The Court correctly applied that standard in this case and determined that the plaintiffs had made out a cognizable claim for defamation-plus under well-established Ninth Circuit law, see Cooper v. Dupnik, 924 F.2d 1520 (9th Cir. 1991); that the claim had survived a motion to dismiss; and that it was appropriate for plaintiffs to continue to litigate their defamation-plus claim even after the majority of their civil rights claims had been dismissed on immunity grounds.

The decision of the Ninth Circuit is not in conflict with any other Court of Appeals decision; does not decide an important federal question in a way that conflicts with any other appellate decision; and does not depart from the "accepted and usual course of judicial proceedings" in such a fashion as to call

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in exceptional cases and only when the law suit was frivolous, vexatious, or brought in bad faith. See, e.g., Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) (addressing Title VII claim); Hughes v. Rowe, 449 U.S. 5, 13 (1980) (addressing civil rights claim).

for an exercise of this Court's supervisory power. Rule 10 of the Supreme Court Rules. The conditional cross-petition for a writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, the conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

Nathan Z. Dershowitz
COUNSEL OF RECORD
Dershowitz & Eiger, P.C.
350 Fifth Avenue, Suite 7912
New York, NY 10118
(212) 967-0667

Attorneys for Petitioners

Amy Adelson
Of Counsel